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Supreme Court, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

JARRETT E. WOODS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit And Request For Summary Reversal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court may summarily deny a motion to dismiss an indictment on double jeopardy grounds without considering any of the documentary evidence offered in support of the motion and without allowing the moving party to present proof in an evidentiary hearing that he has previously been punished by the same sovereign for the same criminal acts for which the sovereign has now indicted him?*

* All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit And Request For Summary Reversal

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jarrett E. Woods, Jr., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 23, 1991, (rehearing denied on January 14, 1992) affirming the District Court's denial of Petitioner's motion to dismiss on grounds of double jeopardy an indictment brought against Petitioner.

OPINIONS BELOW

The unreported order of the United States District Court for the Northern District of Texas denying Petitioner's motion to dismiss indictment for violating the double jeopardy clause may be found in Appendix C. The unreported order of the District Court denying Petitioner's motion to reconsider the order denying Petitioner's motion to dismiss indictment for violating the double jeopardy clause is in Appendix D. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court is in Appendix A and is reported at 949 F.2d 175. The order from the Court of Appeals denying Petitioner's request for a rehearing is in Appendix B and is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1991. A petition for rehearing was denied on January 14, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that –

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

STATEMENT

Procedural History

On October 25, 1990, a thirty-seven count indictment was returned against Petitioner by the United States Grand Jury for the Northern District of Texas. On December 19, 1990, Petitioner filed a motion and a supporting memorandum requesting that the indictment be dismissed with prejudice for violating the Double Jeopardy Clause. (The motion and supporting memorandum are reprinted in Appendix E). Petitioner stated in that motion that he had previously been punished for most of the conduct alleged in the indictment against him when the government placed his two billion dollar savings institution into receivership based, in part, on perceived violations of the law. Petitioner asked the Court to review a sixteen volume administrative record prepared by the Federal Home Loan Bank Board (FHLBB) in support of his motion and he requested an evidentiary hearing. The government responded to Petitioner's motion and Petitioner filed a reply to the government's response. On July 5, 1991, the District Court, without reviewing the FHLBB administrative record and without holding an evidentiary hearing signed an Order Denying Motion to Dismiss Indictment for Violating the Double Jeopardy Clause. (Appendix C). Petitioner filed a timely motion asking the trial court to reconsider its decision. The government responded to that motion. On July 24, 1991, the District Court signed an Order Denying Defendant's Motion to Reconsider Order Denying Motion [to] Dismiss Indictment for Violating the Double Jeopardy Clause. (Appendix D). On August 2, 1991, pursuant to the authority of *Abney v. United States*, 431 U.S. 651 (1977), Petitioner filed

his Notice of Appeal from that order. On October 10, 1991, while Petitioner's appeal was pending, the United States filed a thirty-five count superseding indictment charging Petitioner with substantially the same conduct that was charged in the original indictment.[1] The United States Court of Appeals for the Fifth Circuit, on December 23, 1991, affirmed the District Court's denial of Petitioner's motion to dismiss the indictment on double jeopardy grounds. (Appendix A). The Court of Appeals denied Petitioner's request for rehearing on January 14, 1992. (Appendix B).

Statement of Facts

Petitioner acquired Western Savings Association (then known as Gatesville Savings and Loan Association) of Gatesville, Texas, on August 30, 1982. Petitioner became the chairman of the board of directors and the chief executive officer of Western. All of the stock of Western was held by Western Capital Corporation, a company of which Petitioner was the sole shareholder.

Petitioner operated Western Savings Association until September 12, 1986, when agents of the FHLBB and representatives of other agencies and departments of the United States of America, without any prior notice to Petitioner, seized control of Western. This seizure was effected pursuant to an ex parte resolution of the FHLBB

[1] The District Court allowed Petitioner to apply pretrial motions that he filed in relation to the first indictment to the superseding indictment.

appointing the Federal Savings and Loan Insurance Corporation (FSLIC) the receiver for purpose of liquidation of Western. (See Appendix E, App. p. 20). The FSLIC, immediately following its appointment as receiver, transferred all of Western's assets to a newly created federal savings and loan institution, Western Federal Savings and Loan Association. This action eliminated Petitioner's ownership interest in Western. Petitioner thereby lost control of a valuable institution with close to two billion dollars in assets.

Western was placed into receivership because the FHLBB found, among other things, that Western's management had violated the law in its operation of Western. Some of the FHLBB's findings were placed into a voluminous administrative record that was prepared in support of the resolution appointing the FSLIC as receiver for Western.[2] That administrative record analyzes the "true financial condition" of Western and discusses violations of the law and regulations allegedly committed by the management of Western. For example, the administrative record discusses violations in connection with the "Baypointe Loans" and the "Reagin Loans." The administrative record also makes it very clear that the FHLBB chose to place Western into receivership rather than take some other action against Western management in order to eliminate Petitioner's ownership interest in Western. In

[2] The FHLBB resolution appointing the FSLIC as receiver for Western states that the FHLBB considered oral presentations in addition to the written administrative record in making the receivership appointment. The nature and extent of those oral presentations can only be determined in an evidentiary hearing.

fact, there are a number of places in the administrative record that reveal that the FHLBB was concerned with the conduct of Petitioner (and not Western as an institution) when it placed Western into receivership.[3]

On October 25, 1990, the government obtained an indictment charging Petitioner with a number of violations of the law in connection with his conduct in operating Western Savings Association. That indictment contained thirty-seven counts. On October 10, 1991, a thirty-five count superseding indictment was returned against Petitioner. Both indictments allege that Petitioner engaged in a conspiracy to, among other things, "defraud" the FHLBB and the FSLIC and to "deceive" auditors, examiners, and agents of the FHLBB and the FSLIC. The indictments also allege that Petitioner concealed the "true financial condition" of Western "so that he could maintain control of Western and receive financial benefits from Western for himself and others." The indictments describe various violations of the law in connection with what is called "The Baypointe Transaction." "The Baypointe Transaction" is the same as the "Baypointe Loans" referred to in the FHLBB administrative

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[3] E.g., in a memo dated September 5, 1986, Supervisory Agent H. Joe Selby of the FHLBB recommended that a receiver be appointed to take over Western because under "Jarrett Woods' direction, Western engaged in numerous unsafe and unsound practices and regulatory violations which have resulted in a substantial dissipation of the assets of the association." Also, in the FHLBB meeting during which the vote was taken to place Western into receivership, it was made very clear that the reason the FHLBB chose to place Western into receivership was to "eliminate the interest of the principal stockholder."

record. The indictments refer to various violations of the law in regards to loans to James Reagin and "related parties." The FHLBB action in taking control of Western was also based, in part, on violations of the law in connection with loans to James Reagin and "related parties." In short, in order to prove most of the allegations in the indictments the government will be required to prove conduct that constitutes offenses for which Petitioner was punished by the FHLBB.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO DISMISS THE INDICTMENT AGAINST PETITIONER ON DOUBLE JEOPARDY GROUNDS IN THAT NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT REVIEWED ANY OF THE FACTS THAT PETITIONER OFFERED AND PROPOSED TO OFFER IN SUPPORT OF HIS MOTION.

Petitioner's motion to dismiss the indictment against him raises a substantial constitutional question concerning Petitioner's Fifth Amendment right not to be placed in double jeopardy. The treatment of that motion by the courts below has resulted in Petitioner being denied even the opportunity to present the District Court with evidence establishing that Petitioner has already been punished for the violations of the law alleged in the indictment pending against him. Petitioner presented a facially sufficient claim of double jeopardy to the District Court. In order to be properly understood and ruled on, that claim required the District Court to review certain

documentary evidence and to conduct an evidentiary hearing. The District Court refused to do either thing. The Court of Appeals upheld the District Court's refusal. Petitioner now faces an imminent trial in clear contravention of his right not to be placed in double jeopardy.

The Double Jeopardy Clause

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. CONST. amend. V. This clause of the Fifth Amendment protects against three abuses: 1. a second prosecution for the same offense after acquittal; 2. a second prosecution for the same offense after conviction; and 3. multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause is also intended to prevent the government from subjecting a defendant to undue expense, embarrassment, ordeal and anxiety. *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

The ultimate question in this case is whether the pending prosecution of Petitioner violates the prohibition against multiple punishments for the same offense and whether that prosecution would subject Petitioner to undue expense, embarrassment, ordeal, and anxiety. The immediate question, however, is whether Petitioner is entitled to have the District Court make a proper review of the facts surrounding his double jeopardy claim. The answer to those questions is found in the recent case of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989).

The Halper Opinion

The defendant in *Halper* was convicted in a criminal prosecution of submitting false claims to the government, sentenced to prison, and fined. The government then brought suit against the defendant seeking up to $130,000.00 in civil penalties for the same conduct. This Court barred the government on double jeopardy grounds from collecting any penalties disproportionate to its actual costs arising from Halper's fraud. 109 S.Ct. at 1903-1904. The *Halper* decision was based on the fact that "civil proceedings may advance punitive as well as remedial goals" and that the "notion of punishment cuts across the division between the civil and the criminal law." *Id.* at 1901. The *Halper* Court recognized that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. (emphasis added). In other words, a "civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Id.* at 1901-1902. (emphasis added). If the compensation extracted from a defendant in a civil proceeding greatly surpasses the remedial justice to which the government is entitled, then that compensation becomes clear injustice if the "supposedly remedial sanction far exceeds the government's damages and actual costs." *Id.* at 1901.

The Double Jeopardy Clause bars the government's efforts to punish Petitioner in the pending prosecution if the government's taking of Western Savings Association from Petitioner constitutes punishment for the same conduct for which Petitioner stands indicted. *United States v.*

Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied* 111 S.Ct. 178 (1990).

Punitive or Remedial?

The receiver for Western was appointed pursuant to the provisions of the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(6)(A)(i), (ii),[4] and (iii)(1989), amended 12 U.S.C. § 1464(d)(2)(Supp. 1991); *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1402 (5th Cir. 1987); *cert. denied* 485 U.S. 959 (1988). Admittedly, that act serves a remedial purpose.[5] That, however, does not end our analysis. *Halper* requires us to go farther. Specifically, *Halper* held that

> while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by

[4] This section of the statute authorizes the appointment of a receiver for an association if there has been a "substantial dissipation of assets or earnings due to any *violation or violations of law*, rules, or regulations, or to any unsafe or unsound practice or practices." (emphasis added).

[5] A close reading of the act reveals that it serves punitive and remedial goals. The FHLBB is given power to "enforce compliance with law and regulation" by various means. 12 U.S.C. § 1464(d). This power can be used to punish or sanction individual officers and directors of an institution as it was in this case.

> the Double Jeopardy Clause's proscription of multiple punishments. (citation omitted). This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

United States v. Halper, supra at 1901.

Halper clearly stands for the proposition that a sanction can be remedial, punitive, or both, depending on its application. What the sanction is in a particular case turns on the facts of the case. It is simply not possible to say, as the Court of Appeals in effect did, that an action taken by the government is remedial without reviewing the *facts* surrounding the taking of the action.[6] An examination of the laws and regulations involved in a particular case is not enough. Such an examination fails to recognize that a remedial statute can be applied in a punitive manner.

Whether a particular civil sanction or penalty rises to the level of criminal punishment under *Halper* is a factual issue that must be resolved by the District Court in an evidentiary hearing.[7] *United States v. Mayers*, 897 F.2d

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[6] The Court of Appeals apparently determined that the government action against the Petitioner was remedial and not punitive. That is certainly the inference of the Court's statement that "[b]oth the goal and the operation of the receivership have been to protect the United States treasury from avoidable insurance losses by assuring proper management of the thrift according to the banking regulations." *United States v. Woods*, 949 F.2d 175, 177 (5th Cir. 1991).

[7] It is not significant under *Halper* that the civil proceeding preceded the criminal proceeding. *United States v. Sanchez*

(Continued on following page)

1126, 1127 (11th Cir. 1990), *cert. denied* 111 S.Ct. 178 (1990). *Halper* recognized that such a determination must be based on a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *United States v. Halper, supra* at 1901. In fact, this Court noted in *Halper* that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. (emphasis added). Thus, for the Court of Appeals to conclude that Western was seized for some remedial purpose and not to punish Petitioner for any particular conduct misses the point of *Halper*. *Halper* is very clear that the specific facts of a particular case must be examined in order to determine the nature of the sanctions imposed.[8]

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Escareno, 950 F.2d 193, 200 (5th Cir. 1991); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied* 111 S.Ct. 178 (1990).

[8] The Court of Appeals stated that "[n]o goal or act described pursuant to this receivership was retributive, nor was any meant as a deterrent, as that word has meaning in the criminal law." *United States v. Woods, supra* at 177. How the Court of Appeals reached this factual conclusion without reviewing any facts is difficult to understand. Clearly the Court of Appeals did not read the footnote in *Halper* that states, in pertinent part, "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction that must be evaluated." *United States v. Halper, supra* at 1901 n. 7.

The Same Conduct?

In addition to determining whether a particular remedy imposed in a civil proceeding amounts to punishment, it must also be determined whether the civil remedy is based on the same conduct as the criminal prosecution. *United States v. Mayers, supra* at 1127. In the context of this case, that means disposing first of the finding of the Court of Appeals that the FHLBB's action in placing Western into receivership was directed at Western as an institution and not at Petitioner as an individual.[9] Or, to put it another way, was it the conduct of the institution or the conduct of the Petitioner that caused the FHLBB to place Western into receivership?

Clearly the FHLBB was concerned with the conduct of Western's management (i.e., Petitioner) when it placed Western into receivership. That fact is amply demonstrated by the administrative record prepared by the FHLBB that both the District Court and the Court of Appeals refused to consider. Even the Court of Appeals when it originally reviewed the administrative action taken by the FHLBB in placing Western into receivership recognized the pivotal role played by Petitioner in the

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[9] The Court of Appeals stated that "Woods points to no case that holds an action against a corporation is a punishment of the officers or shareholders for the purposes of ascertaining double jeopardy." *United States v. Woods, supra* at 177. This statement again demonstrates the Court of Appeals' fundamental misunderstanding of the fact-based nature of *Halper*. It also fails to recognize the enormous difference between single owner corporations such as in this case and institutions with multiple shareholders.

FHLBB decision when it stated that Western "had suffered substantial dissipation of assets due to violations of regulations and unsafe or unsound practices *by its management.*" *Woods v. FHLBB, supra* at 1402. (emphasis added).[10]

In deciding whether the FHLBB action was directed at Petitioner or at Western as an institution, it should also be kept in mind that the FHLBB appointed a receiver for the purpose of liquidating Western. This severe course of action was chosen from among the various courses of action available to the FHLBB in an effort to divest Mr. Woods of his ownership of Western. If the FHLBB were simply concerned with controlling or managing the assets of Western or putting the institution into a safe and sound condition, the FHLBB could have appointed a conservator for Western. A conservator would have acted as a guardian or protector of Western. *Cf. Franklin Savings Association v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1141 (10th Cir. 1991). The appointment of a conservator would not have divested Mr. Woods of his property. *Id.* The appointment of a conservator would have fully protected the government's interest in seeing Western operated in a safe and sound manner. The government, however, chose not only to place Western under new management but to punish Petitioner for his conduct in

[10] In summarizing the basis for the FHLBB imposed receivership the Court of Appeals apparently inadvertently left out the FHLBB determination that Western management had violated the law in operating Western.

operating Western by completely taking away Petitioner's ownership of Western.[11] The question then becomes, was Western taken away from Petitioner based on the same conduct for which Petitioner stands indicted.

The superseding indictment alleges that Petitioner concealed the "true financial condition" of Western "so that he could maintain control of Western and receive financial benefits from Western for himself and others." The resolution appointing the FSLIC as receiver for Western found Western to be insolvent. The FHLBB, therefore, must have been concerned with Western's "true financial condition." The indictment also alleges that Petitioner engaged in a conspiracy to, among other things, "defraud" the FHLBB and the FSLIC and to "deceive" auditors, examiners, and agents of the FHLBB and the FSLIC. These are things that the FHLBB surely considered when it found that the management of Western violated the law, rules, and regulations. The indictment alleges various violations of the law in connection with what is called "The Baypointe Transaction." "The Baypointe Transaction" is the same as the "Baypointe Loans" referred to in the FHLBB administrative record. The indictment refers to loans to James Reagin and "related parties." The FHLBB action in taking control of Western was also based, in part, on violations of the law in connection with loans to James Reagin and "related parties."

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[11] There is a line beyond which the seizure of property becomes punishment for the individual owning the property rather than just condemnation of the property itself. *United States v. The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1270 (2nd Cir. 1989). Surely, the seizure of close to two billion dollars worth of assets crosses that line.

The written, administrative record of the FHLBB reveals a substantial overlap between the conduct considered by the FHLBB prior to placing Western into receivership and the allegations in the indictment. Because the FHLBB also considered "oral presentations" in making the receivership decision, it is very likely that the FHLBB considered all of the same conduct for which Petitioner now stands indicted.[12] At the very least, it is clear from reviewing the written FHLBB administrative record and the indictment in this case that the government will be required to prove in Petitioner's trial conduct that constitutes offenses for which Petitioner has already been punished. Such a procedure would violate the Double Jeopardy Clause. *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084, 2093 (1990).

The Need for an Evidentiary Hearing

The two elements to a double jeopardy claim under *Halper* are (1) whether the civil proceeding concerns the same conduct as the criminal proceeding, and (2) whether the penalty imposed in the civil proceeding rises to the level of criminal punishment. *United States v. Mayers*, *supra* at 1127. These are factual issues which must first be resolved by the District Court. *Id.*

[12] Unfortunately, the FHLBB resolution placing Western into receivership does not specify with the precision of an indictment the legal violations found by the FHLBB. The administrative record, however, indicates that the FHLBB considered many of the same loans and issues in reaching its decision that are alleged in the indictment. Further specification of the conduct relied on by the FHLBB would be possible only by questioning the regulators in an evidentiary hearing.

Petitioner clearly stated a double jeopardy claim under *Halper* in his Motion to Dismiss Indictment with Prejudice for Violating the Double Jeopardy Clause and the other pleadings filed in connection with that motion. In fact, Petitioner's claim that the government punished him by taking from him approximately two billion dollars worth of assets is much more substantial than the $30,000.00 sanction at issue in *United States v. Bizzell, supra* or even the $1,791,100.00 penalty at issue in *United States v. Mayers, supra*. The *Mayers* case was, of course, remanded for an evidentiary hearing. *Id.* at 1127. A hearing or at least some review of the facts was apparently conducted in *Bizzell* prior to the appeal being taken. *United States v. Bizzell, supra*. Moreover, *Halper* itself was remanded for an evidentiary hearing to determine if a mere $130,000.00 civil penalty amounted to criminal punishment. *United States v. Halper, supra* at 1903-1904. Petitioner's pleadings, therefore, clearly stated enough of a claim to entitle him to a hearing.

Despite repeated requests by Petitioner for an evidentiary hearing, the trial court refused to hold a hearing. The trial court even refused to consider the written, administrative record of the FHLBB that Petitioner offered in support of his double jeopardy claim.[13] The trial court thus denied Petitioner the opportunity to come

[13] The trial court's original order denying the double jeopardy motion mentions Petitioner's request that the trial court review the administrative record but does not indicate that the trial court considered the record in denying the double jeopardy motion.

forward with evidence of a prima facie, nonfrivolous double jeopardy claim.

An evidentiary hearing is necessary to establish that the seizure of Western Savings Association was based on the same violations of law alleged in the indictment in this case and that the value of Western far exceeded any loss that the government may have suffered because of those violations of the law. In taking Western away from Petitioner the government took control of an extremely valuable business. The government's own administrative record, prepared by the FHLBB, does not show that Petitioner's actions caused the government to suffer any loss. That record points only to the possibility of the government suffering a loss if all of the assets held by Western were sold at fire sale prices at the same point in time and if all of Western's loans went into default at the same time. It is therefore necessary to hold an evidentiary hearing to determine the loss, if any, that the government suffered because of Petitioner's allegedly illegal conduct in operating Western. In other words, Petitioner is entitled to an accounting of the government's damages and costs. *United States v. Halper, supra* at 1902. If the value of Western far exceeded those damages and costs, (as it surely did) then Petitioner was punished when the government took Western from him and he should not be punished again.

An evidentiary hearing is also necessary to establish the reason why the FHLBB placed Western into receivership rather than following some other course of action. If the FHLBB's motive for placing Western into receivership was to deter other thrift operators from engaging in the

same conduct as Petitioner or if the FHLBB sought retribution from Petitioner, (as the administrative record indicates) then Petitioner cannot be punished a second time. *Id.*

While it may be burdensome to the government to hold an evidentiary hearing, it is simply unconscionable not to hold such a hearing. Petitioner must be given an opportunity to demonstrate, in an evidentiary hearing that he has already been punished for engaging in the same conduct for which the government seeks to prosecute him. For the government to say that it is too burdensome to allow Petitioner the opportunity to assert his right to be free from double jeopardy is not and should not be the law of the land. Further, the government should not be allowed to make repeated attempts to punish Petitioner for the same offenses and thereby subject Petitioner to undue embarrassment, expense and ordeal, compelling Petitioner to live in a continuing state of anxiety and insecurity. *Green v. United States*, 355 U.S. 184, 187 (1957).

CONCLUSION

FOR THE ABOVE REASONS, Petitioner respectfully asks that this Court grant the Writ of Certiorari and upon review of the decision below, summarily reverse the judgment of the United States Court of Appeals for the Fifth Circuit and direct that court to remand Petitioner's case to the District Court for a determination of the factual

issues presented by Petitioner's motion to dismiss the indictment against him.

Respectfully submitted,

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APPENDIX A

**The UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Jarrett E. WOODS, Defendant-
Appellant.**

No. 91-1819.

United States Court of Appeals,
Fifth Circuit.

Dec. 23, 1991.

Robert Udashen, Shirley Baccus-Lobel, Dallas, Tex., for Jarrett E. Woods, Jr.

Susan Greenberg and Mark A. Adler, Asst. U.S. Attys., and Marvin Collins, U.S. Atty., Dallas, Tex., for the U.S.

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, JONES, and E. GARZA, Circuit Judges.

PER CURIAM:

This interlocutory appeal is before the court to consider Jarrett Woods's argument that his ongoing criminal prosecution unconstitutionally places him in double jeopardy.[1] He contends that the harm he suffered as sole

[1] The government argues that we have no jurisdiction to hear this interlocutory criminal appeal. The government concedes, however, that interlocutory appeal of the denial of a motion to dismiss a criminal complaint for double jeopardy is

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owner of a savings and loan association that was placed in receivership by the government amounted to a punishment for purposes of the Fifth Amendment.[2] He argues that the current prosecution, on a 37-count indictment relating to bank fraud, thus seeks to punish him for the same conduct for which he was punished by the receivership. He contends that this attempt to punish him is in violation of the Double Jeopardy Clause of the Fifth Amendment of the Constitution.

(Continued from previous page)

permitted. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The government argues that such interlocutory appeals are allowed only to protect the defendant from a second criminal trial, and Woods has never been subjected to a first criminal trial. This argument ignores the effect of civil punishments as a means of double jeopardy, *see United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), which is the very issue raised here by Woods.

The government offers no precedent for the refusal of jurisdiction to hear an argument of double jeopardy by interlocutory appeal. The Supreme Court has made it absolutely clear that the guarantee against double jeopardy may be enforced by interlocutory appeal. The government seeks to evade this means of enforcement by arguing the merits of its substantive argument as a jurisdictional argument. In the light of *Abney*, we obviously have jurisdiction in this matter.

[2] Woods owned a holding company that was the sole shareholder of Western Savings Association, an S & L, which was declared insolvent and placed in receivership by the Federal Home Loan Bank Board in 1986. The circumstances of that insolvency and receivership are described in *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1403 (5th Cir.1987) *cert. denied* 485 U.S. 959, 108 S.Ct. 1221, 99 L.Ed.2d 422 (1988).

Woods asserts *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), as his authority for his position. According to *Halper*, the government may ordinarily pursue both civil and criminal remedies against the same defendant for the same conduct, although some such civil sanctions can trigger double jeopardy. A civil remedy is not a punishment, however, only so long as it does not serve the goals of punishment, mainly, retribution and deterrence. The court noted that this test is an objective one, and that punishment is not to be determined by the view of the defendant, to whom even remedial sanctions "carry the sting of punishment." 109 S.Ct. at 1901, n. 7.

Woods does not deny that placing a banking institution into receivership is done pursuant to a remedial statute. Nor does he deny that placing Western into receivership was a remedial act. Woods argues, however, that a remedial statute may enact a punishment. This argument is true so far as it goes, but his argument that receivership of his bank is a punishment against him has no basis in law.

In the first place, the receivership was directed against the corporation, not Woods. Woods points to no case that holds an action against a corporation is a punishment of the officers or shareholders for the purposes of ascertaining double jeopardy.[3] Consequently, there is

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[3] To illustrate this distinction, we note that in *United States v. WRW Corp.*, 731 F.Supp. 237 (E.D.Ky.1989), the government pursued shareholders to personally pay a fine imposed on their corporation. The shareholders had already been convicted

(Continued on following page)

no basis to consider the receivership, directed against Western, to be directed against Woods.

More importantly, however, even if we were to consider the receivership to be directed against Woods, as an alter-ego of Western, there would be no reason to find the receivership to be a punishment. Both the goal and the operation of the receivership have been to protect the United States treasury from avoidable insurance losses by assuring proper management of the thrift according to the banking regulations. *See* 12 U.S.C. section 1464(d). Moreover, Woods was on notice from the start that the benefits of federal insurance of his thrift came only with the potential burden of receivership. *See* 12 U.S.C. 1461, *et seq*. No goal or act described pursuant to this receivership was retributive, nor was any meant as a deterrent, as that word has meaning in the criminal law. The receivership was no punishment. Double jeopardy is not implicated as relates to the pending criminal prosecution.

The denial of the motion to dismiss the indictment by the district court is therefore

AFFIRMED.

(Continued from previous page)

of a conspiracy related to the corporate misdeeds which brought on the fine. The court held that the fine might have been a punishment of the shareholders but was not, because the fine was not unreasonably related to the government's expense in enforcing the mining law against the corporation. Unlike this case, the shareholders were pursued in their own names to pay a fine from their personal assets because of their own misdeeds. Absent individual liability, there would have been no claim for individual double jeopardy.

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1819

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JARRETT E. WOODS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(January 14, 1992)

Before JOLLY, JONES, and EMILIO GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v. CR 3-90-0276-T

JARRETT E. WOODS, JR.

ORDER DENYING MOTION TO DISMISS INDICTMENT FOR VIOLATING THE DOUBLE JEOPARDY CLAUSE

(Filed Jul. 5, 1991)

On December 19, 1990, Defendant filed a Motion to Dismiss Indictment with Prejudice for Violating the Double Jeopardy Clause. On January 7, 1991, the United States filed its Combined Opposition to Motion to Dismiss on Double Jeopardy Grounds and Motion to Break Seal. On January 18, 1991, Defendant filed a Response to the Government's opposition. On February 26, 1991, the Government filed a Motion for an Order Denying Defendant's Double Jeopardy Motion. On March 12, 1991, Defendant filed a Response to the Government's Motion for an Order Denying Defendant's Double Jeopardy Motion.

Defendant moves the court for an order dismissing with prejudice the indictment for violating the Double Jeopardy Clause. Defendant contends that as sole stockholder of Western Capital Corporation, the parent corporation of Western Savings Association (Western), the Government's seizure of Western punished him for his conduct in operating Western and that it would violate

the prohibition against multiple punishments in the Double Jeopardy Clause to subject him to the risk of further punishment as a result of this proceeding. Defendant contends that the seizure of Western, which included the elimination of Defendant's ownership of Western and the seizure of two billion dollars worth of assets, amounts to punishment because the value of Western far exceeded any loss the Government may have suffered because of Defendant's conduct, and the compensation extracted from Defendant did not provide the Government with simply remedial justice. Defendant contends that the seizure of Western was based upon the same violations of law as alleged in the indictment, and that the Double Jeopardy Clause bars the Government from punishing him a second time in this proceeding for the very same conduct.

Defendant further contends that an evidentiary hearing is necessary to show that the value of the property seized far exceeded any loss suffered by the Government. Defendant further requests the court to review, in connection with this motion, the sealed administrative record prepared by the Federal Home Loan Ban [sic] Board in support of its resolution appointing the Federal Savings & Loan Insurance Corporation the receiver for Western which allegedly shows that the Bank Board's resolution placing Western into receivership was directed specifically at Defendant.[1]

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[1] On December 19, 1990, Defendant filed a motion to break seal on record simultaneously with this motion, and intends to rely on the administrative record to support this motion and other pre-trial motions.

In response, the Government argues that Western's receivership was a lawful and warranted regulatory action arising out of a regulatory scheme designed to protect depositors and the assets of the FSLIC, and was not imposed to punish Defendant. Furthermore, the Government contends that this prosecution and the earlier receivership simply do not reach the same conduct and therefore, the Double Jeopardy Clause is not implicated.

For the following reasons, the court is of the opinion that the motion should be denied.

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435 (1988). Defendant's motion raises the question of whether he was subjected to "punishment" by the appointment of the receiver for Western within the meaning of the Clause. A civil remedy enacted by the government does not rise to the level of proscribed "punishment" unless in a particular case a civil remedy may be so extreme and so divorced from the government's damages and expenses as to constitute punishment. *Halper*, 490 U.S. at 442, 109 S. Ct. at 1898; *U.S. v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990). The court finds that the appointment of a receiver for Western was not a punishment against Defendant nor was it punitive in nature but instead serves a remedial purpose. The appointment was imposed to remedy Western's fiscal condition and was pursuant to a regulatory scheme to protect the FSLIC's financial interest and to protect the government from financial loss. Therefore, the court concludes that Defendant has not already been punished for

the conduct now criminally charged against him, and the Double Jeopardy Clause was not violated in this case.

It is **FURTHER ORDERED** that Defendant's motion to dismiss indictment for violating the Double Jeopardy Clause is denied.

Signed this 3rd day of July 1991.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v. CR 3-90-0276-T

JARRETT E. WOODS, JR.

ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER ORDER DENYING MOTION DISMISS INDICTMENT FOR VIOLATING THE DOUBLE JEOPARDY CLAUSE

(Filed July 25, 1991)

On July 12, 1991, Defendant filed a Motion to Reconsider Order Denying Motion to Dismiss Indictment for Violating the Double Jeopardy Clause.

Defendant moves the court to reconsider its July 5th order denying his motion to dismiss because (1) the court made factual findings without hearing any facts, and (2) the court engaged in a type of legal analysis condemned by the Supreme Court in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989).

Upon consideration, the court is of the opinion that Defendant's motion for reconsideration should be denied as the arguments proffered are without merit. In its order of July 5th, this court found that (1) the appointment of a receiver for Western was not a punishment against Defendant nor was it punitive in nature but instead served a remedial purpose, and (2) the appointment was imposed

to remedy Western's fiscal condition and was pursuant to a regulatory scheme to protect the FSLIC's financial interest and to protect the government from financial loss. To clarify the court's prior order, the court specifically finds that the administratively ordered receivership of Western Savings does not constitute punishment against Defendant under the Double Jeopardy Clause as a matter of law, and that Defendant's motion to dismiss the indictment for violating the Double Jeopardy Clause is frivolous. The holding of *Halper* does not require a contrary result as the penalties discussed in that case are different from the receivership remedy in this case. The court further finds that an evidentiary hearing is not required as Defendant has not presented a colorable claim that the receivership qualifies as former jeopardy.

It is **THEREFORE ORDERED** that Defendant's motion to reconsider prior order denying motion to dismiss indictment for violating the Double Jeopardy Clause is denied.

Signed this 24 day of July 1991.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	X	NO. CR3-90-276-T
VS.	X	
JARRETT E. WOODS, JR.	X	

MOTION TO DISMISS INDICTMENT WITH PREJUDICE FOR VIOLATING THE DOUBLE JEOPARDY CLAUSE

(Filed Dec. 19, 1990)

COMES NOW Jarrett E. Woods, Jr., Defendant in the above styled and numbered cause, pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure, and files this Motion to Dismiss Indictment with Prejudice for Violating the Double Jeopardy Clause, and in support of said motion would show the Court the following:

I.

Defendant Jarrett E. Woods, Jr. was the chairman of the board of directors and chief executive officer of Western Savings Association and the sole stockholder of Western Capital Corporation, the parent corporation of Western Savings Association. As the sole stockholder of Western Capital Corporation, the Defendant was the owner of Western Savings Association at all times relevant to this motion.

II.

On September 12, 1986, agents of the Federal Home Loan Bank Board, and agents of other agencies and departments of the United States of America, without any prior notice to the Defendant, seized control of Western Savings Association, including all of its branch offices and its mortgage banking subsidiaries. This seizure was effected pursuant to an ex parte resolution of the Federal Home Loan Bank Board appointing the Federal Savings and Loan Insurance Corporation the receiver for Western Savings Association. (A. R. XVI 2-7).[1] A true and correct copy of that resolution is attached to this motion as Exhibit A. The effect of appointing a receiver was to eliminate the Defendant's ownership interest in Western Savings Association. (A. R. XV 40).

III.

The government seized Western Savings Association in order to punish the Defendant for perceived violations

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[1] A.R. refers to the administrative record prepared by the Federal Home Loan Bank Board in support of its resolution appointing the Federal Savings and Loan Insurance Corporation the receiver for Western Savings Association. The entire administrative record was filed with the United States District Clerk for the Northern District of Texas in cause number CA3-86-1627-H. That record was placed under seal by the Honorable Barefoot Sanders. Judge Sanders has no objection to this Court breaking that seal. The Defendant therefore filed, simultaneously with this motion, a Motion to Break Seal on Record. The Defendant requests that the Court grant that motion so the administrative record can be reviewed in connection with this motion.

of the law. The violations of the law upon which the Federal Home Loan Bank Board based its seizure of Western Savings Association are the same violations of the law alleged in the indictment in this cause. For example, counts 1, 2, 3, 4, 5, 6, and 7 of the indictment allege various violations of the law in connection with what is called on page 4 of the indictment "The Baypointe Transaction." The resolution of the Federal Home Loan Bank Board taking control of Western Savings Association was based on the same violations of the law. (A.R. I 33-34). Counts 1, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of the indictment all refer to various violations of the law in connection with loans to James Reagin and "related parties." The Federal Home Loan Bank Board's action in taking control of Western Savings Association was also based on violations of the law in connection with loan to James Reagin. (A.R. I 15-26). In short, a review of the entire multi-volume administrative record reveals that the Federal Home Loan Bank Board's action in taking control of Western Savings Association was based on the same course of conduct that is alleged against the Defendant in the indictment.

IV.

When the Government took control of Western Savings Association away from the Defendant the Government took property from the Defendant of a value much greater than any loss suffered by the Government because of the Defendant's conduct. Western Savings Association had approximately two billion dollars in deposits at the time that it was seized by the Government. (A.R. I-11 and IX 71). The Government, at the time

it took control of Western Savings Association, had suffered no loss because of the Defendant's conduct. Any loss that the Government suffered after taking control of Western Savings Association was caused by the Government's own mismanagement of the assets of Western Savings Association. For example, the Defendant believes that the Government disposed of collateral held by Western Savings Association without obtaining full value for that collateral.

V.

The seizure of Western Savings Association punished the Defendant for his allegedly illegal conduct in the operation of Western Savings Association. It was not necessary to take Western Savings Association away from the Defendant in order to provide the Government with the remedial justice to which the Government is entitled. Because the Government chose to punish the Defendant instead of simply seeking compensation for any loss it had suffered, it cannot punish him again in this proceeding for the very same conduct. Any punishment imposed on the Defendant in this proceeding would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The indictment against the Defendant should therefore be dismissed with prejudice.

VI.

In order to fully develop the basis for this Motion to dismiss Indictment with Prejudice for Violating the Double Jeopardy Clause, the Defendant respectfully asks that

the Court schedule an evidentiary hearing on this motion in advance of the trial on the merits. Such a hearing is necessary in order to establish in the record that the conduct that served as the basis for the Government taking control of Western Savings Association from the Defendant is the same conduct that is the subject matter of the indictment in this cause. Further, an evidentiary hearing is needed to establish what, if any, loss the Government suffered as a result of the Defendant's conduct, when the Government suffered that loss, and the value of the "compensation" extracted from the Defendant in relation to that loss.

WHEREFORE, Defendant respectfully asks that the Court schedule an evidentiary hearing on this motion and that, after hearing the evidence and argument of counsel, that this Court dismiss the indictment in this cause with prejudice.

Respectfully submitted,

/s/ Shirley Baccus-Lobel

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Attorneys for Defendant

CERTIFICATE OF SERVICE

On the 19th day of December, 1990, a true and correct copy of the Motion to Dismiss Indictment with Prejudice for Violating the Double Jeopardy Clause was delivered to Mr. Mark Adler, Trial Attorney, United States Department of Justice, 7701 N. Stemmons, Suite 200, Dallas, Texas 75247.

/s/ Shirley Baccus-Lobel
Shirley Baccus-Lobel

CERTIFICATE OF CONFERENCE

On December 18, 1990, I conferred w/Mr. Mark Adler to discuss this motion. On that date, Mr. Adler advised the government is opposed to the motion.

/s/ Shirley Baccus-Lobel
Shirley Baccus-Lobel

DEFENDANT'S EXHIBIT A

FEDERAL HOME LOAN BANK BOARD

Appointment of Receiver for Western Savings Association, Dallas, Texas, Under § 406(c)(1)(B)

No. 86-963

Date: September 12, 1986

WHEREAS, Western Savings Association, Dallas, Texas ("Western"), is an institution incorporated under the laws of the State of Texas, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, Pursuant to § 406(c)(1)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(c)(1)(B) (1982) ("§ 406(c)(1)(B)"), the Federal Home Loan Bank Board ("Bank Board") has exclusive power and jurisdiction to appoint the FSLIC as sole conservator or receiver of an insured institution other than a Federal association in the event that the Bank Board determines that any of the grounds specified in § 5(d)(6)(A)(i), (ii), or (iii) of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464(d)(6)(A)(i), (ii), or (iii) (1982), exists with respect to such insured institution; and

WHEREAS, Pursuant to subsections (ii) (I) and (II) of § 406(c)(1)(B), the authority conferred by § 406(c)(1)(B) may be exercised without delay with respect to Western upon receipt of the written approval of the State official having jurisdiction over Western that any of the grounds specified by the Bank Board for its exercising such authority exists; and

WHEREAS, Pursuant to subsection (i)(II) of § 406(c)(1)(B), in a case in which the Bank Board has exercised its power and jurisdiction under subsection (i)(I) of § 406(c)(1)(B), the FSLIC shall have the same powers and duties with respect to an insured institution other than a Federal association as are conferred upon it under § 406(b) of the NHA, 12 U.S.C. § 1729(b) (1982), with respect to a Federal association; and

WHEREAS, Pursuant to § 406(c)(3) of the NHA, 12 U.S.C. § 1729(c)(3) (1982), in any case in which the FSLIC is appointed receiver of an insured institution pursuant to § 406(c)(1) of the NHA, 12 U.S.C. § 1729(c)(1) (1982), the provisions of § 5(d) of the HOLA, 12 U.S.C. § 1464(d)

(1982), shall be applicable in the same manner and to the same extent as if such institution were a Federal association with respect to which the FSLIC had been appointed receiver; and

WHEREAS, The Bank Board has considered staff memoranda, dated SEPTEMBER 11, 1986, together with accompanying attachments and exhibits (copies of which memoranda are in the Minute Exhibit File):

Grounds for Appointment

NOW, THEREFORE, IT IS RESOLVED, That, on the basis of the administrative record before it, including, but not limited to, oral presentations, the Bank Board finds that the grounds specified in § 5(d)(6)(A)(i), and (iii) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i), (ii), and (iii) (1982), exist with respect to Western in that Western is insolvent in that the assets of Western are less than its obligations to its creditors and others, including its withdrawable accountholders, Western has incurred substantial dissipation of assets and earnings due to violations of law, rules or regulations, and to unsafe and unsound practices, and Western is in an unsafe and unsound condition to transact business; and

Notice to State Official

RESOLVED FURTHER, That the Secretary or an Assistant Secretary shall cause a letter to be delivered to the Commissioner, Department of Savings and Loan of the State of Texas, or designated agent thereof (the "Commissioner"), notifying the Commissioner of the Bank Board's

determination of the existence of the grounds for the appointment of the FSLIC as sole receiver of Western, and requesting written approval that the grounds specified exist, *provided* that the final form of such letter shall be approved by the Office of the General Counsel ("OGC"); and

RESOLVED FURTHER, That upon delivery of such letter to the Commissioner, it shall be deemed to have been received by the official of the State of Texas having jurisdiction over Western within the meaning of subsection (ii)(I) of § 406(c)(1)(B); and

Appointment of Receiver

RESOLVED FURTHER, That the Bank Board, pursuant to § 406(c)(1)(B), appoints the FSLIC as sole receiver of Western ("Receiver") for the purpose of liquidation, *provided* that the exercise of this appointment shall not be effective and this appointment shall not be exercised unless and until an attorney from the OGC, or fee counsel designated by the General Counsel to represent the Receiver, or any person named as a Special Representative of the Receiver, or any Assistant Secretary, shall have received the written approval of the Commissioner that the grounds specified in § 5(d)(6)(A)(i), (ii), and (iii) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i), (ii) and (iii) (1982), exist with respect to Western, and *provided* further that the form of any such approval is satisfactory to the OGC; and

Powers and Duties of Receiver

RESOLVED FURTHER, That, pursuant to § 406(c)(1)(B), (c)(3), and (d) of the NHA, 12 U.S.C. § 1729(c)(1)(B), (c)(3), and (d) (1982), the FSLIC as Receiver shall have and exercise all powers, rights, and privileges, and shall assume, perform, and discharge all duties, responsibilities, and obligations of a receiver for a Federal savings and loan association accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including, but not limited to, § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), and § 406 of the NHA, 12 U.S.C. § 1729 (1982), and the provisions of Parts 547 and 549 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), 12 C.F.R. Parts 547 and 549 (1986); and

RESOLVED FURTHER, That, in addition to all powers and authority of a receiver provided for by law, regulations, and orders, the Receiver is hereby authorized and empowered, and need not seek further approval from the Bank Board, to borrow money in such amounts from any source and in any manner as the Receiver requires to fulfill its duties as receiver, to execute, acknowledge, and deliver evidence of indebtedness for such borrowing, and to secure repayment of such borrowings by mortgages, pledges, and assignments in trust, or hypothecation of any property of Western, *provided* that the form of any contract or security agreement for such borrowings shall be approved by the OGC; and

RESOLVED FURTHER, That the Receiver need not furnish any bond; and

RESOLVED FURTHER, That, notwithstanding the provisions of §§ 548.1 and 549.2 of the Federal Regulations, 12 C.F.R. §§ 548.1 and 549.2 (1986), the Receiver may elect to notify by certified mail all persons and entities that the Receiver knows to be holding or to be in possession of assets of Western; and

RESOLVED FURTHER, That if Western has issued subordinated debt that is outstanding as of the effective date of the appointment of the Receiver, the Receiver is hereby directed to publish notice to subordinated debt holders with respect to their subordinated debt holdings, and the Receiver is, in any case, hereby directed to publish notice to shareholders with respect to their shareholdings; and

Implementing Authority

RESOLVED FURTHER, That the Director or Deputy Director, Office of the FSLIC, or the designee of either of them ("Director"), is hereby authorized to take such action as may be necessary or appropriate to exercise the rights or to carry out the obligations of the FSLIC as Receiver, pursuant to its appointment; and RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not in its capacity as Receiver, is hereby authorized to make advances to the Receiver for the purpose of enabling the Receiver to perform its functions and duties and to pay costs and expenses of the receivership, on such terms and conditions as the Director shall deem appropriate, and the Director may execute such documents as may be necessary to make such advances or enter into collateral agreements, *provided* that the final forms of any such documents and agreements have been approved by the OGC; and

RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not as Receiver, is hereby authorized to obtain assignments of claims of the Receiver, and the FSLIC as Receiver is authorized to render such assignments to the FSLIC in its corporate capacity, *provided* that the FSLIC in its corporate capacity either shall pay fair value for such claim or shall agree to pay over to the Receiver all proceeds received on the claim in excess of the expenses incurred by the FSLIC in pursuing such claim, and *provided* further that the form of any such assignment shall be approved by the OGC; and

Designation of Agents

RESOLVED FURTHER, That Robert L. Pattullo, Raymond Krey, Lew Richey, Thomas Procopio, John Vella, and Robert Schmid are hereby designated as agents of the Bank Board and the FSLIC for the purpose of performing functions of the FSLIC as Receiver; and that Michael F. Duhl, John L. Rogers, III., Van Holkeboer, and Kathy Russo are hereby designated as agents of the Bank Board for the purpose of acting as Assistant Secretary pursuant to Chairman's Order No. -687; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as Special Representative of the Receiver ("SR"); and that such designated person or persons shall have the power and authority to act in the name and on behalf of the Receiver, including the authority, subject to the direction of the Director, to take prompt possession of the books, records, property, and assets of every kind and description of Western and to exercise all powers of the

Receiver; that initially Robert L. Pattullo, Raymond Krey, Lew Richey, Thomas Procopio, John Vella, Edward Gerber, Ann Barnes, John Sears, and Robert Schmid shall each serve as SR; and that the Director may replace or remove any SR and may designate such additional SR(s) as the Director deems appropriate, prescribing the functions and responsibilities of such SR(s) as the Director deems appropriate, *provided*, however, that any SR designated under this resolving paragraph shall not act for or on behalf of the FSLIC in its corporate capacity with regards to Western in receivership; and

Termination of Employment Contracts

RESOLVED FURTHER, That every employment contract between Western and its officers and employees, is hereby terminated by the Bank Board, effective upon the date of default of Western; and

Records and Reports

RESOLVED FURTHER, That each SR shall keep a record of his or her actions as SR for the Receiver, and shall report on such actions from time to time as directed by the Director; and

RESOLVED FURTHER, That the Director shall from time to time report to the Bank Board with respect to actions taken pursuant to this Resolution.

By the Federal Home Loan Bank Board

/s/ Jeff Sconyers
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	X	NO. CR3-90-276-T
VS.	X	
	X	
JARRETT E. WOODS, JR.	X	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
INDICTMENT WITH PREJUDICE
FOR VIOLATING THE DOUBLE JEOPARDY CLAUSE

(Filed Dec. 19, 1990)

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. CONST. amend. V. This Amendment to the Constitution protects against three abuses: 1. a second prosecution for the same offense after acquittal; 2. a second prosecution for the same offense after conviction; and 3. multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). A primary concern of the Double Jeopardy Clause is to prevent the government from subjecting a defendant to undue expense, embarrassment, ordeal, and anxiety. *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

The question in this case is whether the prosecution now before the Court violates the prohibition against multiple punishments for the same offense and whether this prosecution would subject the Defendant to undue expense, embarrassment, ordeal, and anxiety. The answer

to this question is found in the recent case of *United States v. Halper*, ___ U.S. ___, 109 S.Ct. 1892 (1989). The defendant in *Halper* was convicted of submitting false claims to the government, sentenced to prison and fined. The government then brought suit against the defendant seeking up to $130,000.00 in civil penalties for the same conduct. The United States Supreme Court held that "civil proceedings may advance punitive as well as remedial goals" and that the notion of punishment "cuts across the division between the civil and the criminal law." *Id.* at 1901. "A civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 1901-1902. If the compensation extracted from a defendant in a civil proceeding far exceeds the remedial justice to which the Government is entitled, then that compensation becomes punishment. *Id.* at 1900-1901. In other words, if a supposedly remedial sanction does not remotely approximate the Government's damages and actual costs, then "rough justice becomes clear injustice". *Id.* at 1901. If, therefore, the Government's taking of Western Savings Association from the Defendant constitutes punishment, then the Double Jeopardy Clause bars the Government's efforts to punish the Defendant a second time for the same violations of the law.

The Government took control of Western Savings Association pursuant to a resolution of the Federal Home Loan Bank Board. (A.R. XVI 2-7). That resolution placed Western Savings Association into a receivership in order to eliminate the Defendant's ownership interest in that institution. (A. R. XV 40). The resolution found, among other things, that the Defendant violated the law in his

operation of Western Savings Association. The resolution was supported by an administrative record prepared by the Federal Home Loan Bank Board. The taking of Western Savings Association was upheld by the United States District Court for the Northern District of Texas, Judge Barefoot Sanders presiding, in cause number CA3-86-1627-H. The United Stats Court of Appeals for the Fifth Circuit affirmed Judge Sanders' decision. *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400 (5th Cir. 1987); cert. denied 485 U. S. 959 (1987). The District Court and the Court of Appeals held that the Federal Home Loan Bank Board did not act in an "arbitrary and capricious" manner in taking Western Savings Association from the Defendant. Even though the District Court and the Fifth Circuit did not subject the Bank Board's action to rigorous review, it is fair to say, that the Courts upheld the findings of the Federal Home Loans Bank Board, contained in the resolution and the administrative record, that the Defendant violated the law in his operation of Western Savings Association.

A review of the administrative record makes it clear that the Federal Home Loan Bank Board found that the same actions alleged in the indictment against the Defendant to be violations of the law were in fact violations of the law that justified the taking of Western Savings Association from the Defendant. (See, e.g. A.R. I 33-34 – Baypointe Loans; A.R. I 15-27 – Reagin Loans). It is submitted that an evidentiary hearing would show that the seizure of Western Savings Association was based on the same violations of law alleged in the indictment in this case and that the value of Western Savings Association far

exceeded any loss that the Government may have suffered because of the Defendant's conduct. In taking Western Savings Association from the Defendant the Government took from the Defendant control of approximately two billion dollars in deposits. (A.R. IX 71). The Government's own administrative record, prepared by the Federal Home Loan Bank Board, does not show that the Defendant' actions caused the Government to suffer any losses. That record only points to the probability of the Government suffering losses if all of the collateral held by Western Savings Association were sold at fire sale prices at the same point in time and if all of Western's loans went into default at the same time. It is therefore necessary to hold an evidentiary hearing to establish the loss, if any, that the Government suffered because of the Defendant's allegedly illegal conduct prior to the Government taking control of Western Savings Association. It is submitted that an evidentiary hearing would show that the Government suffered no losses because of the Defendant's conduct prior to the Government taking control of Western Savings Association and that any losses that the Government may have incurred after the seizure of Western Savings Association were the result of the Government's own mismanagement of the assets of Western Savings Association. For example, the Defendant believes that an evidentiary hearing would establish that the Government disposed of assets of Western Savings Association in a commercially unreasonable manner thereby causing the losses that the Government incurred in connection with Western Savings Association. The basis upon which the Government took control of Western Savings Association and the losses, if any, suffered by the

Government cannot be accurately determined without an evidentiary hearing. In short, the Defendant is entitled to "an accounting of the Government's damages and costs to determine if the penalty sought [in this proceeding] in fact constitutes a second punishment." *United States v. Halper, supra* at 1902.

The seizure of Western Savings Association punished the Defendant for his conduct in operating Western Savings Association. The seizure of Western Savings Association amounts to punishment because the "compensation" extracted from the Defendant did not provide the Government with remedial justice. This is true because the Government had not suffered a loss anywhere near the value of Western Savings Association prior to the Government seizing control of Western Savings Association. The indictment in this cause seeks to punish the Defendant for the same conduct that led the Federal Home Loan Bank Board to take control of Western Savings Association. It would therefore violate the prohibition against multiple punishments in the Double Jeopardy Clause to subject the Defendant to the risk of further punishment as a result of this proceeding. It would also clearly subject the Defendant to undue expense, embarrassment, ordeal, and anxiety to prosecute the Defendant a second time for conduct for which he has already been punished.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 19th day of December, 1990, a true and correct copy of the Memorandum in Support of Motion to Dismiss Indictment with Prejudice was delivered to Mr. Mark Adler, Trial Attorney, United States Department of Justice, 7701 N. Stemmons, Suite 200, Dallas, Texas 75247.

/s/ Shirley Baccus-Lobel
Shirley Baccus-Lobel